PUBLISHER'S NOTE:

Original Pagination is not continuous.

87 1085

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1987

FAITH CHRISTIAN FELLOWSHIP INTERNATIONAL, INC.,
FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE, INC.,
a/k/a WORD ALIVE CHRISTIAN FELLOWSHIP,
a Wisconsin religious corporation,

Petitioner,

v.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE,
a Wisconsin quasi-judicial municipal body,
and CITY OF MILWAUKEE,
a Wisconsin municipality,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF JOHN J. McLARIO
Attorneys for Petitioner
By John J. McLario and
Robert C. Castro
N88 W16783 Main Street
Menomonee Falls, Wisconsin 53051

STATEMENT OF ISSUE

Should the courts below have applied strict scrutiny in reviewing the actions of the City of Milwaukee Board of Zoning Appeals in denying the petition for a special exception presented by Faith Christian Fellowship; and did said action of the Zoning Board constitute an unconstitutional application of the zoning ordinance to petitioner, violating its right to the free practice and exercise of its religion.

STATEMENT OF CORPORATE RELATIONSHIP

Petitioner is Faith Christian Fellowship of Milwaukee, Inc., a/k/a Word Alive Christian Fellowship; it has no subsidiary corporation and its parent corporation is Faith Christian Fellowship International, Inc.

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUE and STATEMENT OF CORPORATE RELATIONSHIP . . .	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GROUNDS FOR JURISDICTION	v
APPLICABLE CONSTITUTIONAL PROVISIONS . .	vi
STATEMENT OF THE CASE	1
ARGUMENT	6
CONCLUSION	17
TABLE OF CONTENTS FOR APPENDIX	vii

TABLE OF AUTHORITIES

Columbus Park Congregation of Jehovah's Witnesses, Inc. v. The Board of Appeals of the City of Chicago,
25 Ill. 2d 65, 182 NE 2d 722 (1962)

Fahri v. Deal Borough Commissioners,
204 N.J. Super. 575, 499 A 2d 559 (1985)

In the Matter of North Shore Hebrew Academy v. Wegman,
105 A.D. 2d 702, 481 N.Y.S. 2d 142
(A.D. 2 Dept. 1984)

Jacobi v. Zoning Board of Adjustment,
413 Pa. 286, 196 A. 2d 742 (1964)

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,
699 F 2d 303 (1983)

Mozert v. Hawkins County Public Schools,
647 F. Supp. 1194 (E.D. Tenn. 1986)

Sherbert v. Werner,
374 U.S. 398 (1963)

State ex rel Lake Baptist Church v. Village of Bayside Board of Trustees,
12 Wis. 2d 585, 108 NW 2d 288 (1961)

Wisconsin v. Yoder,
406 U.S. 205 (1971)

Walbach v. Zoning Board of Appeals,
82 Ill. App. 2d 88, 266 NE 2d 679 (1967)

TABLE OF AUTHORITIES CONTINUED

CONSTITUTIONAL PROVISIONS

U.S. Constitution
Amendment I

U.S. Constitution
Amendment XIV
Section 1

ZONING ORDINANCE

MILWAUKEE CITY ZONING CODE

Secs. 16-6(5), 16-9(2), 16-9(3)

All references to the Milwaukee City Zoning Code are to the provisions as they existed at the time of the Zoning Board's decision. The Code was amended effective January 1, 1986. Those amendments changed the numbering system, but did not alter the substance of the provisions involved in this case. A-25-29.

GROUNDS FOR JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. secs. 1257(3) and 2101(c), and under Rule 17(b), (c), on the grounds that the Supreme Court of the State of Wisconsin as the court of last resort has by its order dated August 18, 1987 denied petitioner's petition for review; the effect of which is to accept as law in the State of Wisconsin, a Court of Appeals for the State of Wisconsin's decision which ultimately affirmed the Trial Court's decision in affirming the denial of petitioner's request for a special exception permit. The decision of the Court of Appeals for the State of Wisconsin and correspondingly the Supreme Court of the State of Wisconsin involves an important federal question and is in conflict with the decisions of other State Courts of last resort, with several federal Courts of Appeals, and with previous decisions of this Court.

APPLICABLE CONSTITUTIONAL PROVISIONS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble and to petition the Government for a redress of grievances. U.S. Constitution, Amendment I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws. U.S. Constitution, Amendment XIV, Section 1.

STATEMENT OF THE CASE

The instant case is before the Court on a petition for a writ of certiorari to review a decision of the Supreme Court of the State of Wisconsin. Petitioner applied in September of 1985 to the respondent for a special exception permit to occupy the ground floor of a building located at 4630 West North Avenue in the City of Milwaukee, State of Wisconsin, to establish a church therein. This property, however, was zoned "Local Business" under section 16-9 of the then existing Milwaukee Zoning Code and as such petitioner was required to procure a special exception from the Zoning Board in order to use the proposed site for a church. App. A-25-29.

Petitioner was granted a temporary occupancy permit allowing it to use the property as a church while it submitted the appropriate application to the Board of Zoning Appeals for the City of Milwaukee

along with the necessary supporting documents.

Shortly thereafter, on October 2, 1985, petitioner applied to the Board of Zoning Appeals for the City of Milwaukee for a special exception permit which would allow petitioner to establish its church in the subject premises. The application of the petitioner was heard at a public hearing before the Zoning Board of Appeals for the City of Milwaukee on November 21, 1985. Prior to this public hearing, the City Plan Commission submitted a report recommending denial of the petitioner's application although one of the City staff planners had recommended its approval. The Board of Zoning Appeals denied petitioner's application by an Order dated December 19, 1985. App. A-20-22.

The petitioner then sought review of the decision in the Circuit Court, County of Milwaukee, State of Wisconsin. In its Complaint, and in oral arguments heard before

the trial court on July 1, 1986, petitioner raised two constitutional issues. Petitioner first argued that the Zoning Ordinance itself was unconstitutional on its face, for failure to provide an adequate standard. Second, petitioner argued that the Zoning Board's application of the Ordinance was an unconstitutional interference with petitioner's free exercise of religion, and was therefore arbitrary and capricious. App. A-33-37, 38-39. By an order dated August 1, 1986, the Circuit Court, County of Milwaukee, State of Wisconsin held that the Board's conduct was neither arbitrary nor capricious and that there was a rational basis from the evidence in the record to allow the respondent to make the findings that it did. The Trial Court further held that the zoning ordinance in question was not facially violative of the constitutional guarantees of freedom of religion. App. A-8-19.

Petitioner appealed to District I of the Court of Appeals of the State of Wisconsin.

In its initial and reply briefs to the Court of Appeals, petitioner raised two constitutional issues. The first question asked whether the Trial Court applied the appropriate standard in reviewing the actions of the City of Milwaukee Board of Zoning Appeals. Petitioner's second question raised at the Court of Appeals level was whether the action of the city of Milwaukee Board of Zoning Appeals constituted an unconstitutional application of the Milwaukee Zoning Ordinance to the petitioner. Based solely on the briefs submitted, the Court of Appeals for the State of Wisconsin in a decision rendered on June 23, 1987 summarily affirmed the Circuit Court. App. A-3-7.

Petitioner subsequently sought review of the Court of Appeals decision by way of writ of certiorari in the Supreme Court for the State of Wisconsin. Being the highest authority in the State of Wisconsin, the Supreme Court for the State of Wisconsin was the court of last resort on the State level.

Again in its petition to the Wisconsin Supreme Court petitioner raised the identical constitutional concerns it had raised at the Court of Appeals level. In an Order dated August 18, 1987 the Supreme Court of the State of Wisconsin denied the petition for writ of certiorari, and in so doing made the Court of Appeals decision the applicable law in the State of Wisconsin. App. A-1-2. Any additional facts necessary to the Court's determination of this petition will be set forth in the argument section.

ARGUMENT

In this case, the petitioner has argued that the action of the Zoning Board in denying its application for a special exemption to operate as a church in the local business district was an unconstitutional application of the ordinance to the church which violated its right to freely exercise its religion. This issue was not addressed at all by either the Wisconsin Supreme Court, or the Wisconsin Court of Appeals, and was handled only tangentially by the State Circuit Court. The Court of Appeals decided in error that petitioner had abandoned its constitutional challenge, when in fact petitioner had abandoned only its challenge to the facial constitutionality of the ordinance, reserving and briefing extensively the question of whether the Board had applied the ordinance in an unconstitutional way. The Circuit Court and those above it then compounded this unconstitutional action by

refusing to strictly scrutinize the action of the Board.

This refusal to apply the standard of strict scrutiny is in violation of the precepts established by this Court in the cases of Sherbert v. Werner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1971). In these cases, and the ones that followed, this Court established several key principles. A provision in a regulation which is neutral on its face may offend the constitution in its application. Yoder at 220. In addition, only state interests of great magnitude can override the important rights protected by the free exercise clause. Sherbert at 406, Yoder at 214-215. This requirement for "strict scrutiny" has been applied to zoning cases involving church use in several jurisdictions.

In the case of North Shore Hebrew Academy v. Wegman, 481 N.Y.S. 2d 142, 105 A.D. 2d 702 (1984) the New York Appellate Court applied strict scrutiny and found that

a zoning decision prohibiting an existing Jewish day care school from holding performances on Sundays was an unconstitutional application of that ordinance which deprived the church of its free exercise rights. Id. at 144-146. The Supreme Court of Illinois made a similar holding in Columbus Park Congregation v. Board of Appeals, 25 Ill. 2d 65, 182 NE 2d 722 (1962). In that case, the Court found the Chicago Board of Appeals had applied an ordinance provision similar to the one at issue in this case in a constitutionally impermissible way, which in that case, as in this one, prevented the congregation from using the building as a church. Id. at 724-726. The circumstances in the Columbus Park case are also very similar to those of Faith Christian Fellowship here. Both dealt with denials of applications for a special permit to operate a church in a business district with an adjacent residential area. Even the reasons propounded by the business

district neighbors to deny the petition were similar. However, while in Columbus Park, the Court in Illinois applied strict scrutiny to reverse, the courts in Wisconsin have refused to apply this standard to review the Board's action. In Fahri v. Deal Borough Commissioners, 204 N.J. Super 575, 499 A. 2d 559 (1985), the New Jersey Supreme Court applied strict scrutiny to overturn the enforcement of an ordinance to prevent petitioners from worshipping in a home. Id. at 563-564. Finally, in Wisconsin in 1961, the Wisconsin Supreme Court decided a case in which a church was prevented from building by a zoning ordinance. State ex rel Lake Baptist Church v. Village of Bayside Board of Trustees, 12 Wis. 2d 585, 108 NW 2d 288 (1961). In finding that the application of the provision to the church was arbitrary and capricious, the Court indicated, "A church . . . is not to be viewed merely as the owner of property . . . . . ," and later, "We conclude that it is the duty of a Court to

give the closest scrutiny to the questions of whether the exclusion of a church from a district is justified." Id. at 295, 297. (Emphasis added.) As in later federal cases, the Court determined, "the test is whether a regulation is an undue infringement." Id. at 296.

The Wisconsin Supreme Court refused to accept review by certiorari, and the Court of Appeals affirmed the Circuit Court without reference to Bayside, which is the only case in Wisconsin applying a zoning ordinance to a church. While the Court of Appeals determined that petitioner had abandoned its constitutional challenge, this is not the case. Petitioner abandoned it challenge to the ordinance on its face, but has maintained its challenge to the action of the Board in applying the ordinance since its complaint to the Trial Court. App. at A-33-37, 38-39. Only the Circuit Court dealt with Bayside. While accurately setting forth the standard set forth in that case, the Court went on to

find that barring petitioner from this building was not a substantial burden on its free exercise of religion. Petitioner contends that in light of Yoder, Sherbert and following cases, this decision was error, and that there is a substantial burden to the constitutional rights of petitioner which require review by strict scrutiny.

The principles of Sherbert and Yoder have been applied in a series of cases in the Sixth Circuit Court of Appeals in recent years. The culmination of this development appears to be Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F 2d 303 (1983), and Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), on remand from Sixth Circuit, 765 F 2d 75. Lakewood dealt with a church's attempt to relocate to a larger and better facility in a community by buying a lot and building. The Sixth Circuit held that strict scrutiny was not required because the threshold issue of infringement of the

free exercise of religion had not been met. The Court found that what the ordinance restricted was the secular decision to buy land and build, not the ability to worship. (They already had a facility in the city). Therefore, since no burden was placed on a "religious observance", strict scrutiny was not implicated. Id. at 305-308. The present case differs from Lakewood in several respects. First and most importantly, as will be set forth in greater detail below, the burden in this case is central and substantial, notwithstanding the finding of the State Circuit Court. In addition, Lakewood expressly dealt not with application of the ordinance, but with its facial constitutionality. However, this difference is not crucial since any question regarding whether strict scrutiny should be applied in a case on unconstitutional application was resolved by Yoder, and was also resolved in the Sixth Circuit by Mozert. That case dealt with a challenge to a school district's

decision compelling participation in classes using the "Holt series". This case dealt with the application of state law, with no challenge to the statute on its face. On remand, the Sixth Circuit directed the District Court to apply essentially the Lakewood standard; that is, whether the action burdened the exercise of religion, and if so, whether a compelling government interest justified the burden. Id. at 1197, quoting 765 F 2d 75 at 78. The District Court had no difficulty in finding that compelling students to read material religiously offensive was a substantial burden, and applied strict scrutiny to fashion a lesser restrictive alternative in the form of an "opt-out" provision.

Notwithstanding the decision of the Circuit Court below, this case deals with a substantial burden on the free exercise of religion which requires the application of strict scrutiny. The Court in Lakewood determined that rights to worship were not

implicated in that case, merely the desire to relocate. Id. at 307. Here the burden is to the heart of petitioner's right to worship. The record indicates that the area surrounding petitioner is bilingual. Petitioner provides bilingual worship, counseling and service to this immediate community. There is no other church in this area meeting this need. If petitioner is required to close its doors, its Hispanic members will be faced with the choice of worshipping in area churches in which their worship will be hindered by language barriers, or to travel far across town to churches distant from their neighborhood and community. App. A-30-32. Worship without understanding is no worship at all. Further, many courts have long understood and articulated the importance of having the church within the neighborhood of its congregation. Walbach v. Zoning Board of Appeals, 82 Ill. App. 2d 88, 226 NE 2d 679 (1967); Fahri, supra at 560. In the

Wisconsin case of Bayside, in his concurring opinion, Justice Hallows recognized the importance of locating a church near its parishioners, and went on to add, "How can the exclusion of churches from a residential area promote public morals or the general welfare? To so hold is a failure to understand the purpose and influence of churches . . . . 'To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society.'" Id. at 301; quoting Young Israel Organization of Cleveland v. Dworkin, 105 Ohio App. 89, 133 NE 2d 174, 183 (1956). While the church here is in a business district, that district as in the Columbus Park case is narrow and adjacent to a substantial residential area. As a result, the concern for locality is equally compelling, as it was to the Court in other locality cases cited, and the burden equally severe when the opportunity for

available, local, meaningful worship is denied by the application of local zoning provisions.

Therefore, the circumstances in this case require the application of strict scrutiny, and the failure of the Court in Wisconsin to apply that standard to this case conflicts not only with applicable decisions of this Court, but also with decisions from the Sixth Circuit and other state courts of last resort, including earlier precedent by the Supreme Court of Wisconsin.

CONCLUSION

There is no serious question in this case that the decision of the Board substantially burdens petitioner's free exercise of their religion. Central to their worship is the availability of Spanish in the service. The Board's decision effectively prevents them from worshipping in their first language. This burden on the free exercise of their religion requires that the decision of the Board be reviewed by applying strict scrutiny. This is clear from the earlier decisions of this Court, along with those of several states. Strict scrutiny should be applied regardless of the nature of the burden, so long as it exists.

The record in this case makes clear that strict scrutiny has not been applied at any previous stage. Therefore, petitioner asks this Court to grant Certiorari, reverse the Wisconsin Supreme Court, and remand with

instructions to apply strict scrutiny as required by the decisions of this Court.

Dated this ___ day of December, 1987.

LAW OFFICES OF JOHN J. McLARIO

Attorneys for Petitioner-Appellant

By_____
John J. McLario

And_____
Robert C. Castro

P. O. Address:
N88 W16783 Main Street
Menomonee Falls, Wisconsin 53051
414/251-4210

TABLE OF CONTENTS FOR APPENDIX

	Page
DECISION OF WISCONSIN SUPREME COURT . . .	A-1
DECISION OF WISCONSIN COURT OF APPEALS .	A-3
DECISION OF CIRCUIT COURT AND ORDER . . .	A-8
DECISION OF ZONING BOARD	A-20
DECISION OF WISCONSIN SUPREME COURT . .	A-23
MILWAUKEE ZONING ORDINANCE	A-25
SELECTIONS FROM TRANSCRIPT OF PROCEEDINGS BEFORE ZONING BOARD . . .	A-30
SELECTIONS FROM TRANSCRIPT OF PROCEEDINGS BEFORE CIRCUIT COURT . .	A-33
CIRCUIT COURT COMPLAINT	A-38

Office of the Clerk
SUPREME COURT
State of Wisconsin

Madison, August 18, 1987

TO: Hon. Joseph P. Callan
Milwaukee County Circuit Court
821 W. State St., Rm. 404
Milwaukee, WI 53233

John J. McLario
Law Offices of John J. McLario
N88 W16783 Main Street
Menomonee Falls, WI 53051

Thomas O. Gartner
Asst. City Attorney
200 E. Wells St., #800
Milwaukee, WI 53202-3551

Gary J. Barczak
Milwaukee County Clerk of Court
901 N. 9th St.
Milwaukee, WI 53233

The Court today announced an order in your case as follows:

No. 86-1875 Faith Christian Fellowship of Milwaukee v. Board of Zoning Appeals of the City of Milwaukee, et al. T.C.#700-065

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf

of plaintiff-appellant-petitioner Faith Christian Fellowship of Milwaukee, a/k/a Word Alive Christian Fellowship, and considered by the court,

IT IS ORDERED that the petition for review is denied with $50.00 costs.

Heffernan, C.J. and Day, J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court

DISTRICT I
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Madison, June 23, 1987

TO: Robert C. Castro
Law Office of John J. McLario
N88 W16783 Main St.
Menomonee Falls, WI 53051

Thomas O. Gartner
200 E. Wells St., 8th Fl.
Milwaukee, WI 53202

Clerk of Circuit Court
Milwaukee, WI 53233

Hon. Joseph P. Callan
Milwaukee, WI 53233

You are hereby notified that the Court entered the following opinion and order:

#86-1875 Faith Christian Fellowship of Milwaukee, a/k/a Word Alive Christian Fellowship v. Board of Zoning Appeals of the City of Milwaukee et al (L.C. No. 700-065)

Before Moser, P.J., Wedemeyer, Sullivan, JJ.

Faith Christian Fellowship, a/k/a Word Alive, filed a complaint seeking certiorari review of a decision by the Board of Zoning Appeals of Milwaukee. Word Alive appeals

from the circuit court's order affirming the board's denial of its application for a special use exception to operate a church in an area zoned for business use. Based upon our review of the briefs and record at conference, we conclude that this case is appropriate for summary disposition. See Rule 809.21, Stats. We affirm the circuit court's order.

Word Alive requested two distinct types of relief. It sought certiorari review of the board's decision and, in the alternative, a declaration that the zoning ordinance itself was unconstitutional. On appeal, Word Alive has abandoned its claim that the ordinance is unconstitutional on its face.

Word Alive argues on appeal that the circuit court applied an incorrect standard in reviewing the zoning board's actions. It contends that because the board's denial of the special use exception impinges on its members' freedom of religion, the circuit court was required to strictly scrutinize the

board's decision. Word Alive further contends that unless the board's determination was justified by a compelling state interest, the circuit court was required to overturn the decision.

Word Alive confuses the standard of review applied to a zoning board's decision with the scrutiny given a zoning ordinance facing constitutional challenge. Review of a board's decision on certiorari is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. Snyder v. Waukesha County Zoning Bd. of Adjustment, 74 Wis. 2d 468, 475, 247 NW 2d 98, 102 (1976).

Pursuant to Milwaukee, Wis., Code of Ordinances, sec. 16-6(5)(f)Z.C. (1982)[1], before granting a special use exception, the board must find that the special exception will not impact adversely on adjoining property or the neighborhood in general.

Because the record contains several witnesses' testimony that approval of Word Alive's application would add to the over development of churches in the area and would discourage commercial development, the evidence was such that the board could reasonably determine that the presence of the church would adversely affect the neighborhood in general.

Upon the foregoing reasons,

---

[1]Milwaukee's zoning ordinance was recodified effective January 1, 1986. References to the ordinance in this order are to the sections in effect in 1985.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to Rule 809.21, Stats.

Marilyn L. Graves
Clerk of Court of
Appeals

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE,
a/k/a WORD ALIVE CHRISTIAN FELLOWSHIP,
a Wisconsin religious corporation,

Plaintiff,

v.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE,
a Wisconsin quasi-judicial municipal body,
and CITY OF MILWAUKEE,
a Wisconsin Municipality,

Defendants.

DECISION ON APPEAL OF A DECISION OF THE BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE
Case No. 700-065

This matter is before the Court on a complaint seeking the remedy of certiorari. The Board of Zoning Appeals of the City of Milwaukee (the Board) denied the plaintiff's application for a Special Use Exception to operate a church at a location zoned for commercial use. The plaintiff is represented by Attorney John A. Keck of Schetter, Keck & Fuhrman. The defendants are represented by

Grant F. Langley, City Attorney, and Thomas O. Gartner, Assistant City Attorney. Briefs have been filed by both parties and oral argument was heard on July 1, 1986.

Plaintiff, Faith Christian Fellowship of Milwaukee, is a religious corporation which applied for a permit to occupy premises at 4630 West North Avenue, Milwaukee, Wisconsin on September 30, 1985. The area was zoned commercial, and use of the premises as a church required a Special Use Exception pursuant to then sec. 16-9(3)(b) of the Milwaukee Code of Ordinances. The plaintiff had previously entered into a three-year lease of the subject premises. In an initial determination on November 19, 1985, the City Plan Commission determined that the desired use would have an anticipated adverse impact on the abutting property and the adjacent neighborhood and would discourage commercial development in the area. The plaintiff took an appeal to the Board. The Board is authorized to hear and decide Special

Exceptions to the terms of the City's zoning ordinance pursuant to sec. 62.23(7)(e)(7), Stats. A public hearing was held on November 21, 1985. Testimony was heard pro and con as to the impact of the proposed church use on the area. By a decision dated December 19, 1985, the Board upheld the prior determination denying the Special Use Exception. The instant appeal arises from the December 19, 1985 decision.

The plaintiff seeks reversal of the Board decision on two grounds. First, the plaintiff argues that the Board's decision was arbitrary, capricious and did not properly evaluate the evidence before it. Second, it is claimed that the zoning ordinance at issue here violated Federal and State constitutional guarantees of freedom of religion.

The Wisconsin Supreme Court in Snyder v. Waukesha County Zoning Board, 74 Wis. 2d 468, 475; NW 2d 98, 102 (1976), characterized the scope of the court's review power on

certiorari.

> "This case is before the court on certiorari, and thus, is limited to: 1) Whether the board kept within its jurisdiction; 2) whether it proceeded on a correct theory of law; 3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and 4) whether the evidence was such that it might reasonably make the order or determination in question.

Snyder goes on to note at 475-476, that, as in other types of administrative reviews, courts are hesitant to interfere with administrative determinations and findings of the Board may not be disturbed if any reasonable view of the evidence sustains such findings.

The Board is specifically empowered to act upon applications for Special Use Exceptions pursuant to sec. 62.23, Stats.,

and the terms of the zoning ordinance of the City of Milwaukee. The Board acted within its jurisdiction in the denial of the Special Use Exception.

In considering an application for a Special Use Exception, the Board is to follow the standards set forth in sec. 16-6(5)(f)z of the Milwaukee Code of Ordinances. The Board is required to find that the special exception is deemed necessary for the public convenience at a particular location, that the special exception is designed, located and operated in a manner so that the public health, safety and welfare is protected, and that the special exception will not impact adversely on adjoining property or the neighborhood in general. Considering these standards, the Board could not make the finding that the Special Use Exception would not impact adversely on adjoining property or the neighborhood in general. The plaintiff argues that no reasonable view of the evidence supports this conclusion.

Testimony was heard relative to the proliferation of churches on West North Avenue between 27th and 60th Street and the adverse impact this had on commercial development. The economic development coordinator for the Cooperation West Side Association and several merchants from the area testified to that effect. A representative of the City of Milwaukee Department of City Development testified that the recommendation of the City Plan Commission was that the plaintiff's application be denied because the use would discourage commercial development in the area.

The plaintiff presented testimony from several people, including Pastor Ceballos of the church, as to the positive effect of the proposed church on the area. Emphasis was placed on the bilingual nature of the church and counseling services that could be offered. The plaintiff argues that many of the witnesses who testified in opposition to

the church have businesses or residences at least ten blocks from the property in question and not the essentially neutral position of a businessman whose establishment is across the street from the site.

As always, there are competing views of the evidence presented. The Board considered the testimony heard on November 21, 1985. There was clearly evidence in the record which could allow the Board to reasonably make the finding that it did. The Board did not act in an arbitrary or capricious manner.

The plaintiff claims the zoning ordinance in question is unconstitutional because the requirement of a Special Use Exception for church use in a local business zoning classification is in violation of the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution. In support of its position the plaintiff cites State ex rel. Lake Drive Baptist Church v. Bayside Village

Board, 12 Wis. 2d 585; 108 NW 2d 288 (1960). That decision points out, however, that an ordinance which excludes a church from a particular district is not in violation of constitutional guarantees of freedom of religion per se.

> "An ordinance which excludes a church from a particular district must pass two tests:
>
> 1) Can it reasonably be said that the use for a church would have such an effect on the area that exclusion of such will promote the general welfare, and 2) Does the exclusion pose a burden upon freedom of worship which is not commensurate with the promotion of general welfare secured?"

State ex rel. Lake Drive Baptist Church, supra, at 599.

The special exception process contained in the ordinance in question charges the Board with the duty to consider the general

welfare in deciding whether to grant or deny the Special Use Exception. As such, the zoning ordinance satisfies the first test of the Lake Drive case.

In considering the ordinance in relation to the second test, it is important to realize that the Lake Drive decision noted that any restriction upon the opportunity to build a church or use premises as such is at least a potential burden upon the freedom of worship. To be violative of constitutional guarantees, the regulation must be an undue infringement. Lake Drive, supra, at 599. In the instant case, the Board considered the number of churches already serving the area. The plaintiff notes that the proposed church will be bilingual and no such church presently operates in the immediate area. The inquiry, again, is the nature of the burden. A number of churches do operate in the area. If the Hispanic residents of the area desire to attend a bilingual church, they will have to travel outside of the

immediate neighborhood, but this is not the type of burden upon the freedom of worship which would make this zoning ordinance unconstitutional.

The denial of the Special Use Exception by the Board was based upon evidence considered under the standards set forth in the ordinance. The findings of the Board were not arbitrary, nor capricious. Neither is the ordinance violative of the constitutional guarantees of freedom of religion. As such, the findings and decision of the Board of Zoning Appeals of the City of Milwaukee are affirmed.

It is so ordered.

Dated at Milwaukee, Wisconsin this 1st day of August, 1986.

BY THE COURT:

/s/
Joseph P. Callan
Circuit Judge, Br. 36

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE,
a/k/a WORD ALIVE CHRISTIAN FELLOWSHIP,
a Wisconsin religious corporation,

Plaintiff,

v.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE,
a Wisconsin quasi-judicial municipal body,
and CITY OF MILWAUKEE,
a Wisconsin municipality,

Defendants.

ORDER AFFIRMING DECISION OF THE BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE
Case No. 700-065

The above captioned matter having come before the Court for oral argument on July 1, 1986, and the Court having completely reviewed the file and the Briefs of both parties, and having heard the argument of counsel, and having entered its memorandum decision of the Board of Zoning Appeals of the City of Milwaukee;

IT IS HEREBY ORDERED that the decision

of the Board of Zoning Appeals of the City of Milwaukee denying a special use exemption to the plaintiff is affirmed.

Dated this 30th day of September, 1986.

BY THE COURT:

/s/
Joseph P. Callan
Circuit Court Judge
Br. 36

BOARD OF ZONING APPEALS
CITY OF MILWAUKEE

In the Matter of the Appeal of: No. 15161

WORD ALIVE CHRISTIAN FELLOWSHIP
by Mary Gracia, Treasurer
Brian Wiegand, Land Contract
Fee Holder: Thomas Mahas

Premises - 4630 West North Avenue

The above matter came on for hearing before the Board on November 21, 1985, on appeal from a denial of the Commissioner of Building Inspection of the City of Milwaukee dated September 30, 1985, of a request to occupy the first floor as a church on the above subject premises.

Section 16-9(3)(b)1 of the Milwaukee Code of Ordinances: A report from the City Plan Commission and a public hearing by the Board of Zoning Appeals are required.

Appearances: H. F. Schweikart, Planning Administration

Gregory Blando,
Building Inspection
Department
Pastor Ruben Ceballos
Irene Kaiser
Mary Gracia
Ben Johnson
Mike Murphy
Robert Douchette
George Butzer
Jan Goetsch
David Powell

The Board of Zoning Appeals, after receiving a report from the City Plan Commission, and after due notice to the parties in interest and having heard the evidence of the petitioner, interested parties and the City of Milwaukee, and being fully advised in the premises,

It was determined that the use requested would have an adverse impact on the abutting property owners and the neighborhood because of the overintensification of this use in this area; and

Having found that there was no showing that the use requested was necessary for the public convenience at this location, and there was no showing that the use requested

would not adversely impact on adjoining property or the neighborhood in general; and

There was considerable testimony that there was a proliferation of similar uses in the area which results in a decrease of commercial services in this particular area;

IT IS ORDERED:

That upon motion duly made, seconded, and carried, a request for a special use exception to use the first floor of the existing building on the above subject premises as a church is denied.

Dated December 19, 1985.

BOARD OF ZONING APPEALS

By /s/
Chairman

Office of the Clerk
SUPREME COURT
State of Wisconsin

Madison, August 18, 1987

TO: Hon. Joseph P. Callan
Milwaukee County Circuit Court
821 W. State St., Rm. 404
Milwaukee, WI 53233

John J. McLario
Law Offices of John J. McLario
N88 W16783 Main Street
Menomonee Falls, WI 53051

Thomas O. Gartner
Asst. City Attorney
200 E. Wells St., #800
Milwaukee, WI 53202-3551

Gary J. Barczak
Milwaukee County Clerk of Court
901 N. 9th St.
Milwaukee, WI 53233

The Court today announced an order in your case as follows:

No. 86-1875 Faith Christian Fellowship of Milwaukee v. Board of Zoning Appeals of the City of Milwaukee, et al. T.C.#700-065

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf

of plaintiff-appellant-petitioner Faith Christian Fellowship of Milwaukee, a/k/a Word Alive Christian Fellowship, and considered by the court,

IT IS ORDERED that the petition for review is denied with $50.00 costs.

Heffernan, C.J. and Day, J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court

16-6(5)(f) Findings

1. Variances. No variance to the provisions of this chapter shall be granted by the board unless it finds beyond a reasonable doubt that all of the following facts and conditions exist, and so indicates in the minutes of its proceedings.

2. Special Exceptions. No special exception or use requested shall be granted by the board unless it finds the following conditions exist, and so indicates in the minutes of its proceedings.

a. Necessity for Public Convenience. The special exception is deemed necessary for the public convenience at a particular location.

b. Protection of Public Health, Safety and Welfare. The special exception is designed, located and operated in a manner so that the public health, safety and welfare is protected.

c. Protection of Property. The special exception will not impact adversely on adjoining property or the neighborhood in general.

16-9(2)(b) Special Exceptions.

In a neighborhood shopping district, no building or land shall be used and no building or occupancy permit or any license as required by the Milwaukee code shall be issued for any of the following specified uses until the board of appeals, after receiving a report thereon from the city plan commission and after due notice to the parties in interest and public hearing, has determined that the special exception for the use requested is consistent with the spirit and purpose and intent of this ordinance, will not substantially and permanently injure the appropriate use of neighboring property and will serve the public convenience and welfare. (Am. Ord. 152, F#60-3068-k. Sept 30, 1975.)

16-9(2)(b)

3. Churches, provided that consideration is given to the availability of parking and that the proposed use would not detract from the character of the surrounding neighborhood.

16-9(3) Local Business Districts.

Local business districts are intended to provide a wide range of goods and services to a large consumer population coming from an extensive area. Within this district, automobile related activities are of major significance. Good access by automobile or transit is important to local business districts which should preferably be located adjacent to intersections of major thoroughfares and in close proximity to transfer locations.

(a) Uses Permitted in Local Business Districts. In a local business district, no building or land shall be used and no building shall be erected which is arranged,

intended, or designed for any use other than those hereinafter specified as follows:

1. Any use permitted in a neighborhood shopping district as listed in Section 16-9(2)(a).

(b) Special Exceptions. In a local business district, no building or land shall be used and no building or occupancy permit or any license as required by the Milwaukee code shall be issued for any of the following specified uses until the board of appeals, after receiving a report thereon from the city plan commission and after due notice to the parties of interest and public hearing, has determined that the special exception for the use requested is consistent with the spirit and purpose and intent of this section, will not substantially and permanently injure the appropriate use of neighboring property, will serve the public convenience and welfare, and that such uses conform to the additional regulations as set

forth herein for each of the respective use groupings:

requirement for a church to be established. As a matter of fact, there is approximately 46 parking spaces, including the parking lot across the street and the parking lot to the east side of the building, which far exceeds the requirement for a church, and, also according to Mr. Ubick, he stated that for a size of our congregation that we only needed five parking spaces would be required, which we have adequate parking spaces, and, also, there is a Teachers' Union--United Teaching Profession next to us on the east side, and we have a written, signed statement by them with their approval that they would approve of us being there signed by Mr. Gibson. I think you have a record of that. Also, the resident behind us at 2320 North 47th Street, she signed an agreement also, which you have a record of, stating that she would not be an objection to us being there, and we feel that we would be--we would be a help to the community in that area because we do work in conjunction with the 700 Club. We do

challenge in that area. I think you're familiar with that one challenge on 27th and the 700 Club in that area. And there is also something that we overlooked to put in your--in some of your papers was that we are a bilingual church. We do deal with both English- and Hispanic-speaking people, and there's a lot of referrals from the teen challenge in that area and the 700 Club area, which have a lot of Hispanic people in that area. I used to live in that area, and I know as a fact there are Hispanic people in that area, and when they are referred to churches, they have to go all the way to the south side to deal with Hispanic-speaking people who could counsel them. And we are a counseling center also, not just a church. We counsel, we teach, and we feel that we could counsel with Spanish-speaking people in the area as well as English-speaking people without them having to go all the way to the south side. And there's people in that area that are Hispanic that are already attending

our church already. I think the nearest churches to our church is at least eight or nine blocks away, and we notice that predominantly the churches in that area are Black, and we are a bilingual church. We both deal with English and Spanish people in the area, and we feel the Hispanic people in the area also do have a need, and they should go there when they can come and seek spiritual help without going all the way to the south side. There should be a counseling center where they can come when they need some kind of help in that area where we can help them. We feel because of this, we have--and because we have met all the requirements-- We presently have a temporary permit issued to us by the Occupancy Permit Department because we met all the requirements, all the quotas and all the ordinances have been met for us to be a church in that area. That's why they issued us a temporary permit, so we are legally there. We have every intention being there

and in the Bayside case it was a residential area. I just want to quote from part of this on page 365: ". . . It was not necessary for the court to decide whether ordinances are valid which allow churches only by special permit, and no decision on this issue was reached in the Bayside case. . . ." No other Wisconsin cases have been found on that specific point. "However, it seems probable that the court would handle such an ordinance in the same way it handled Bayside's ordinance:", and here is the thrust of what I would like to point out to the Court: "The ordinance and the action pursuant to the ordinance would be carefully scrutinized, and if either were arbitrary, it would not be enforced against a church."

Now, I'm not suggesting per se that the ordinance that requires a proposed church use to come before a board is basically arbitrary. I did argue that, but for the sake of argument today, let's say that it is not arbitrary. But I do suggest that the

action of the Board is arbitrary because there is no other evidence to support their finding, other than the fact that this particular use will over-intensify church uses in that particular area and, in turn, affect them monetarily, chase away customers in effect.

There is no credible evidence that there are too many churches in that particular area. There is no credible evidence as to what the area is, either. Does it run from Third Street to 60th -- 27th? No credible evidence whatsoever. And I submit to the Court that just saying that there are too many churches and it's going to hurt us monetarily is violative of the constitutional right to freedom of religion. And for the Board to ground its finding on that particular fact is clearly arbitrary and capricious.

Another thing that was interesting is on the record, a gentleman who owned a building right across the street had a tavern, cocktail lounge, and he testified and he was

curious as to whether or not he would be offensive to the church use. He was not opposed to it.

So what I mean to tell the Court today is that even if on its face a reading of the ordinance is that the ordinance is not arbitrary, the action of the Board in using this ordinance is clearly arbitrary and I see no reason to belabor that. I pointed that out in the brief and I think the map is there to show the Court. Basic law is that if there is any basis to sustain the findings and any credibility in the findings of the Board, then it shall stand, but here I submit there is no credibility because they based it upon facts that were really not there.

THE COURT: Counsel?

MR. GARTNER: Good Morning, your Honor.

THE COURT: Good morning.

MR. GARTNER: Section one of our brief addresses have cited no cases either within or without Wisconsin standing for the proposition that it's in any way improper for

municipalities to regulate churches by making churches a special exception.

Counsel for plaintiffs contends that this ordinance provision is somehow unconstitutional and yet, they have cited no cases from the State of Wisconsin or from any other jurisdiction indicating that the regulation of churches through zoning ordinances is in any way violative of the constitution. And the Wisconsin courts have specifically recognized in the Bayside case that both parties have cited that it is proper for municipalities to regulate churches. That's specifically what's being done here and we submit that the Zoning Board determination was supported by ample evidence in the record and that there was indeed a reasonable basis for that decision. Thank you.

THE COURT: Thank you. Mr. Keck?

MR. KECK: Yes, one particular point. The Bayside case also stands for the proposition that any zoning restriction on

the opportunity to build or operation a house of worship is at least a potential burden on the freedom of religion.

Most of the cases that came up involved building of churches in residential areas and as I pointed out or said before, this is a different situation in what amounts to

1985 denied Word Alive's application for a special exception to use the premises as a church. A copy of said decision is attached hereto and incorporated herein as Exhibit B.

9. The Board of Appeals abused its discretion, incorrectly interpreted the provisions of the Zoning Ordinance, and as a matter of law erred in that:

(a) It applied inapplicable standards in reviewing Word Alive's applications for a special exception;

(b) It incorrectly interpreted the standards it did apply;

(c) It incorrectly determined that the church use would have an adverse impact on abutting property owners and the neighborhood because of overintensification of churches in the area;

(d) It incorrectly found Word Alive had a burden to show that public convenience would be served by a church use here and the further burden to show non-adverse impact on adjoining property on the

neighborhood;

(e) It incorrectly and improperly considered testimony that there was a proliferation of church uses to the detriment of commercial services in the area in question;

(f) It incorrectly set a standard that in effect allows commercial use to regulate religious use, and consideration thereof violates the First Amendment, U.S. Constitution and Article 1 Section 18, U.S. Constitution.

10. The factual findings of the Board of Appeals are incorrect and are not supported by the evidence in the record.

11. Word Alive has a program to improve and upgrade the interior and exterior of the premises and landscape all of which will enhance the neighborhood.